35 U.S.C. 121 states: "[i]f two or more independent and distinct inventions are claimed in one application, the Director may require the application to be restricted to one of the inventions [emphasis added]." 37 CFR 1.142 states "[i]f two or more independent and distinct inventions are claimed in a single application, the examiner in an Office action will require the applicant in the reply to that action to elect an invention to which the claims will be restricted[emphasis added}..." Hence the question of whether or not there are independent and distinct inventions must be based on the claims. In response to the Examiner's careful analysis of all of the claims and his determination of the alleged 3 distinct inventions, Applicants request the Examiner share this information with the Applicants and give the claims associated with each species.

Applicants also request the Examiner's rationale for the 3 distinct classes. Applicants cannot traverse a mere conclusory statement with reasoned arguments. The request for rationale is based on MPEP 816 which states:

> The particular reasons relied on by the examiner for holding that the inventions as claimed are either independent or distinct should be concisely stated. A mere statement of conclusion is inadequate. The reasons upon which the conclusion is based should be given.... The separate inventions should be identified by a grouping of the claims with a short description of the total extent of the invention claimed in each group, specifying the type or relationship of each group as by stating the group is drawn to a process, or to subcombination, or to product, etc., and should indicate the classification or separate status of each group, as for example, by class and subclass. See MPEP § 809.

In addition, even though the inventions may be either distinct or independent, the Examiner must show there is a serious burden if the claims are not restricted. MPEP 803 states:

> an application may properly be required to be restricted to one of two or more claimed inventions only if they are able to support separate patents and they are either independent... or distinct .... If the search and examination of an entire application can be made without serious burden, the examiner must examine it on the merits, even though it includes claims to independent or distinct inventions.
>
> .....
>
> For purposes of the initial requirement, a serious burden on the examiner may be prima facie shown if the examiner shows by appropriate explanation of

separate classification, or separate status in the art, or a different field of search as defined in MPEP § 808.02.

It appears the Office Action format is taken from MPEP 809.02(a). It also appears that the Examiner has designated the distinct species by figures without designating the claims associated with the species. Without the designation of which claims are in which species, if the Applicants disagree with the Examiner on the claims being distinct, the Applicants are put in the awkward position of first guessing at what claims the Examiner believes are distinct and then arguing against their own guess. This causes undue expense and time for the Applicants. Thus, because from above the statute and CFR requirement that the Examiner make a determination on whether there are two or more independent and distinct inventions based on the claims, Applicants request at least a rationale for the Examiner not specifying the claims associated with each alleged species.

However, to fulfill the requirements of a responsive reply, Applicants provisionally elect, under protest and traverse, Species II and claims 1-20 and withdraw claims 23-27.

Respectfully submitted,

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*I hereby certify that this correspondence is being deposited with the United States Postal Service as **first class mail** in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450, on June 14, 2006.*

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KK:pat